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 Including Professional Corporations  
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**UNITED STATES DISTRICT COURT**  
**SOUTHERN DISTRICT OF CALIFORNIA**

LILIA PERKINS, on behalf of herself  
 and all others similarly situated,

Plaintiff,

v.

PHILIPS ORAL HEALTHCARE, INC.,  
 a Washington Corporation; PHILIPS  
 ELECTRONICS NORTH AMERICA  
 CORPORATION, a Delaware  
 Corporation; and DOES 1 through 20,  
 inclusive.

Defendants.

CASE NO.: 12-cv-1414H BGS

Judge: Hon. Marilyn L. Huff

**NOTICE OF MOTION AND MOTION  
 FOR PRELIMINARY APPROVAL OF  
 CLASS SETTLEMENT; AND  
 PLAINTIFF'S MEMORANDUM OF  
 POINTS AND AUTHORITIES IN  
 SUPPORT**

Hearing Date:

Hearing Time:

Courtroom: 15A

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**NOTICE OF MOTION AND MOTION**

PLEASE TAKE NOTICE that on \_\_\_\_\_, at \_\_\_\_\_ a.m. before the Honorable Marilyn L. Huff in Courtroom 15A, 15th Floor of the United States District Court for the Southern District of California, located at 333 West Broadway, San Diego, California 92101, Plaintiff Lilia Perkins will and hereby does move for an order (i) granting preliminary approval of the parties' proposed class settlement, (ii) conditionally certifying a settlement class, (iii) appointing Plaintiff as class representative and her attorneys as class counsel, (iv) directing dissemination of the proposed class notice, (v) barring new lawsuits through the time of the final order on confirmation, and (vi) setting the date and time of a fairness hearing to determine whether the settlement should be granted final approval and whether and to what extent fees should be awarded to class counsel and whether an "incentive" award should be provided to the Plaintiff.

Plaintiff's motion is based on this notice; the accompanying Memorandum of Points and Authorities, Declaration of Michael I. Rott and all attachments thereto (including the Settlement Agreement), and Proposed Order Granting Preliminary Approval of Class Settlement, Proposed Long Form Notice to the Settlement Class; and all other papers filed and proceedings had in this action.

Dated: May 28, 2013

**HIDEN, ROTT & OERTLE, LLP**

By: s/ERIC M. OVERHOLT

Michael Ian Rott, Esq.

Eric M. Overholt, Esq.

*Attorneys for Plaintiff*

**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. INTRODUCTION**

Plaintiff Lilia Perkins filed this class action to address the marketing of the Philips Sonicare AirFloss as a replacement for traditional floss. Plaintiff was concerned that other people in

1 California were misled about the efficacy of the AirFloss and the way that Philips advertised the  
2 product.

3 Plaintiff's counsel and Philips Oral Healthcare, Inc., and Philips Electronics North  
4 America Corporation ("Philips") have negotiated a settlement that addresses the primary concerns  
5 identified by Plaintiff, as well as additional issues identified since the filing of the case. If  
6 approved by the Court, the settlement will provide AirFloss owners in California with (1) notice  
7 of the marketing and efficacy issues and (2) a voucher for certain California residents who  
8 purchased an AirFloss in California between January 1, 2011 and June 24, 2013. Plaintiff and her  
9 counsel believe the settlement provides favorable relief to Class Members in a timely manner and  
10 therefore seek to begin the settlement approval process outlined in the Manual for Complex  
11 Litigation (Fourth) §§ 21.632-35 and applicable law. They respectfully request that the Court  
12 review the parties' Stipulated Class Settlement ("Settlement Agreement"), (Rott Decl., Exh. 1),  
13 and enter an order:

- 14 1. Granting preliminary approval of the settlement;
- 15 2. Certifying provisionally the proposed class for settlement purposes;
- 16 3. Appointing Plaintiff Lilia Perkins as class representative and her counsel, Michael I. Rott  
17 and Eric M. Overholt at Hiden, Rott & Oertle, LLP, as class counsel;
- 18 4. Directing that notice be disseminated to the class as proposed;
- 19 5. Enjoining any Settlement Class Members from instituting any new litigation against Philips  
20 or any of its affiliates related to the AirFloss and/or its marketing or sales until the court may rule  
21 on the Settlement at or after the Final Approval Hearing; and
- 22 6. Setting a hearing date and briefing schedule for final approval of the settlement and  
23 consideration of Plaintiff's fee application.

## 24 **II. SUMMARY OF THE LITIGATION AND SETTLEMENT**

### 25 **A. Plaintiff's Complaint**

26 Plaintiff filed her initial complaint in June of 2011. *See* Dkt #1 (Compl.); Dkt #5 (FAC).  
27 Plaintiff alleged that the Sonicare AirFloss was advertised as a replacement for traditional floss,  
28 when it is not a proper replacement for traditional floss. Plaintiff alleged that the advertisement

1 as a replacement for floss induced her and members of the class to purchase the Sonicare  
2 AirFloss.

3 On behalf of herself and the class of individuals in California who purchased a Sonicare  
4 AirFloss, Plaintiff claimed that Philips violated California consumer protection laws by  
5 representing that the AirFloss was a replacement for traditional floss when in reality it is an  
6 adjunct to traditional flossing and brushing. Plaintiff requested damages, restitution, penalties,  
7 disclosure about the true efficacy of the product and an injunction to prohibit Philips from  
8 continuing to sell the product as a replacement for floss. Following preliminary discussions  
9 between the parties, Plaintiff filed her First Amended Complaint on June 11, 2012, which  
10 dismissed her claim under the Magnuson Moss Warranty Act, but otherwise asserted substantially  
11 the same claims as the original complaint.

## 12 **B. Investigation, Litigation and Settlement Negotiations**

### 13 **1. Plaintiff's Pre-suit Investigation & Pre-suit Demand Letters**

14 In the course of investigating the claims against Philips, Plaintiff's counsel reviewed  
15 numerous complaints on the internet about the efficacy of the product. (Rott Decl. par. 2).  
16 Plaintiff's counsel also interviewed other consumers who had used the product and were  
17 dissatisfied with the results. (*Id.*) The complaints on the internet and complaints of other  
18 individuals mirrored Plaintiff's complaints and frustrations.

19 To determine if the AirFloss really did not function as a replacement to floss, Plaintiff's  
20 counsel conducted their own research into the American Dental Association standards for floss.  
21 To better substantiate their own research regarding whether an oral irrigator is the same as  
22 traditional floss and to begin the long process of preparing a case, Plaintiff's counsel enlisted the  
23 help dentists who answered our questions and provided guidance. (*Id at par. 3.*)

24 Plaintiff sent, with the assistance of counsel, a pre-lawsuit letter pursuant to the California  
25 Consumer Legal Remedies Act outlining all of the complaints that she had regarding the AirFloss  
26 and the way that it was advertised on the packaging and on the Philips website. In response to  
27 that letter, Philips hired counsel and denied Plaintiff's allegations.

28 ///

## 2. Phillips' Motion to Dismiss

On October 31, 2012, Philips filed a Motion to Dismiss the FAC. *See* Dkt. 6. Philips argued that the Court should dismiss Plaintiff's First Amended Complaint in its entirety. After the issues were fully briefed, the Court issued an Order granting in part and denying in part Philips' Motion. The Court dismissed the express warranty claim and one of the three CLRA claims, but allowed the fraud-based claims, UCL claims, the express warranty claims and the remaining CLRA claims to go forward. The Court denied Philips' motion to dismiss any of the other claims.

## 3. Settlement Negotiations

Plaintiff and her counsel appeared at an Early Neutral Evaluation ("ENE") conference with the Honorable Judge Bernard G. Skomal on April 10, 2013. Prior to the ENE conference, Plaintiff's counsel and counsel for Philips had some initial discussions about Plaintiff's claims and the possibility of settlement. At the ENE, Judge Skomal assisted the parties in communicating the perceived strengths and weaknesses with the parties' respective positions. By the end of the ENE, the parties had a preliminary agreement on the amount of and conditions for the vouchers for the Class Members. Over the course of the next month Plaintiff's counsel and Philips' counsel engaged in continued negotiations about notice procedures and, ultimately, Plaintiff's attorneys' fees and costs.

Based on these negotiations and our firm's own investigation, the settlement is in the best interests of the putative class members. Plaintiff's counsel specifically balanced the terms of the proposed settlement, including both the settlement amount and the benefits conferred to class members against the probability of liability, the risk of non-certification, the risks and expense of trial as well as concerns about the likelihood of numerous appellate issues. Counsel also considered the timing of recovery, delays in receipt of funds due to trial and potential appeal and similar issues. (*Id.*, par 9)

## C. Summary of the Settlement Agreement

### 1. Terms of the Settlement Agreement

Settlement Class Members who timely file a valid claim by an approved claims deadline

1 and provide all required proof of purchase, such as a receipt or other documentation to  
 2 substantiate their AirFloss purchase, or return the product to Philips, as approved and validated by  
 3 the Claims Administrator, shall have the right to obtain relief, as detailed below:

4 **TIER 1 — CATEGORY A:** Any Settlement Class Member who:

- 5 (a) submits a timely, valid and written Claim; *and*
- 6 (b) provides proof that they purchased a new two-pack AirFloss; *and*
- 7 (c) provides an attestation that they never previously obtained any refund or
- 8 other compensation from Philips or a retailer in connection with the
- 9 AirFloss purchase for which they seek relief here,
- 10 shall receive a voucher for \$33.00.

11 **TIER 1 — CATEGORY B:** Any Settlement Class Member who:

- 12 (a) submits a timely, valid and written Claim; *and*
- 13 (b) provides proof that they purchased a new single-pack AirFloss; *and*
- 14 (c) provides an attestation that they never previously obtained any refund or
- 15 other compensation from Philips or a retailer in connection with the
- 16 AirFloss purchase for which they seek relief here,
- 17 shall receive a voucher for \$23.00.

18 **TIER 2:** Any Settlement Class Member who:

- 19 (a) submits a timely, valid and written Claim; *and*
- 20 (b) provides an attestation that they purchased a new AirFloss; *and*
- 21 (c) provides an attestation that they never previously obtained any refund or
- 22 other compensation from Philips or a retailer in connection with the
- 23 AirFloss purchase for which they seek relief here,
- 24 shall receive a voucher for \$7.00.

25 There shall be no limit on the number of vouchers to be distributed in the aggregate to the  
 26 Settlement Class Members. There shall be no limit on the value of the voucher payments under  
 27 the Settlement Agreement. Settlement Class Members may submit, subject to proof, one Claim  
 28 Form and are limited to two vouchers per household for Tier 1 Settlement Class Members and

1 one voucher per household for Tier 2 Settlement Class Members pursuant to the Settlement  
2 Agreement.

3 The terms of the Vouchers provided to Class Members is as follows:

- 4 A. Vouchers shall be fully transferable; and  
5 B. Vouchers must be used within twelve months after issuance and after that date  
6 shall become valueless; and  
7 C. Vouchers may be used for the purchase of any new (i) Philips audio or video  
8 products (excluding televisions), (ii) Philips Norelco shaving and grooming  
9 products, (iii) Philips Sonicare oral care products, (iii) Philips accessories, and (iv)  
10 Avent-branded products (collectively the "Eligible Products").

11 The settlement vouchers provide substantial and meaningful benefits to the class  
12 members. *First*, the settlement vouchers can be used at many of the nation's largest retailers and  
13 are not limited to purchases made directly from Philips. *Second*, the amounts of the vouchers,  
14 particularly for Tier 1 Settlement Class Members, are sufficient to purchase a significant number  
15 of Philips products without requiring the Settlement Class Member to spend additional cash,  
16 *Third*, the vouchers are freely transferable. Taken together, these features enhance the value of  
17 the Settlement for the Settlement Class Members and support a finding that the Settlement should  
18 be preliminarily approved.

19 **2. Costs of Notice and Administration, Class Representative Enhancement and**  
20 **Attorney Fees**

21 Philips shall be responsible to pay all Claims Administrator Expenses and all Notice  
22 Expenses, including the CAFA notice.

23 Class Counsel agrees to make, and Philips agrees not to oppose, an application for the  
24 award of Attorneys' Fees and Expenses in this Action not to exceed a total of \$114,500.00. If and  
25 when ordered, such fees and expenses will be paid by Philips within ten business days of the  
26 Effective Date, as defined in the Stipulation of Class Action Settlement. Philips will not be liable  
27 for any attorneys' fees or costs to any party that exceeds this all-in number of \$114,500.

28 Philips agrees to pay the Class Representative the amount of such Incentive Award, if any,

as may be approved by the Court, up to \$750.00. Philips agrees that it will not object to, or otherwise challenge, the Class Representative's applications for an Incentive Award, so long as the Class Representative does not seek an award in excess of \$750.00. If awarded by the Court, the Incentive Award will be paid to Class Counsel for the benefit of the Class Representative within ten business days of the Effective Date, as defined in the Stipulation of Class Action Settlement. Any Incentive Award approved by the Court shall be paid by Philips in addition to the Settlement benefits to Settlement Class Members and the Attorneys' Fees and Expenses otherwise provided for in this Agreement. The Class Representative shall also be entitled to submit a Claim Form and participate in the Settlement as a Settlement Class Member.

### 3. Method of Notice

Subject to Court approval, notice shall be accomplished by the following:

a. mailing a postcard containing information related to the settlement and an URL for a specially-created website dedicated to the settlement (the "Settlement Website") to all purchasers of an AirFloss for whom Philips has a mailing address in its customer database (a copy of that post card can be found at Exhibit 6);

b. sending an email message containing information related to the settlement and a link to the Settlement Website to all purchases of an AirFloss for whom Philips has an email address in its customer database (note that for those customers for whom Philips has both an email and mailing address, only the email address will be used) (a copy of that email can be found at Exhibit 7);

c. a one-time publication of a 1/8 page advertisement in the Los Angeles Times and a one-time publication of a 1/8 page advertisement in the San Francisco Chronicle;

d. for the month following the publication, internet advertising targeting potential Class Members through keyword services provided by Google and Yahoo and other advertising on various social networking websites, including Facebook (which will include a posting of a link to the settlement Website on the AirFloss Facebook page);

e. the issuance of an agreed-upon press release with a link to the Settlement Website through the PR Newswire service, which will distribute the press release to

1 approximately 5,815 newspapers, television stations, radio stations and magazines as well as  
 2 approximately 5,400 websites and online databases, including all major search engines (a copy of  
 3 the press release can be found at Exhibit 8);

4 f. posting notice on the Philips website related to Sonicare and AirFloss  
 5 products together with a link to the Settlement Website;

6 g. a toll-free telephone support system will be established that will provide  
 7 Class Members with (1) general information about the settlement; (2) frequently asked questions;  
 8 and (3) the ability to request a Notice and Claim Form;

9 h. Class Counsel shall provide a direct link to the Settlement Website from  
 10 their firm's website;

11 Upon Preliminary Approval of the Settlement, as the Court may direct, the Claims  
 12 Administrator shall cause the Class Notice to be disseminated to potential Settlement Class  
 13 Members as provided herein. Notice shall be disseminated pursuant to the Notice Program on or  
 14 before the Notice Date. Copies of the proposed forms of Class Notice are attached as Exhibits 4  
 15 and 5 to the Settlement Agreement.

### 16 **III. ARGUMENT**

#### 17 **A. Overview of the Class Action Settlement Process**

18 Prior to granting preliminary approval of a settlement, the Court should determine that the  
 19 proposed settlement class is a proper class for settlement purposes. Manual for Complex  
 20 Litigation § 21.632 (4th ed. 2004); *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 620 (1997). A  
 21 class action settlement like the one proposed here must be approved by the Court to be effective.  
 22 See Fed. R. Civ. P. 23(e). The process for court approval is comprised of three principle steps:

- 23 1. A preliminary approval hearing, at which the court considers whether the proposed
- 24 settlement is within the range of reasonableness possibly meriting final approval;
- 25 2. Dissemination of notice of the proposed settlement to Class Members for comment; and
- 26 3. A formal "fairness hearing," or final approval hearing, at which the Court decides
- 27 whether the proposed settlement should be approved as fair, adequate, and reasonable to
- 28 the class.

1 See Manual for Complex Litigation (Fourth) §§ 21.632-34 (2004); see also *Orvis v. Spokane*  
 2 *County*, 281 F.R.D. 469, 476 (E.D. Wash. 2012) (“The Proposed Settlement Agreement . . .  
 3 appears to be within the range of reasonableness and accordingly shall be submitted to the class  
 4 members for their consideration and for a hearing under Fed. R. Civ. P. 23(e).”).

5 By this Motion, Plaintiff asks the Court to take the first step in the settlement approval  
 6 process and grant preliminary approval of the settlement. Pursuant to the terms of the Settlement  
 7 Agreement, Plaintiff requests that the Court:

8 a. Determine, preliminarily, that this Settlement Stipulation and the  
 9 Settlement set forth herein fall within the range of reasonableness and merits possible final  
 10 approval and dissemination of Notice to the Settlement Class;

11 b. Determine, preliminarily, that the Class Representative is a member of the  
 12 Settlement Class and that, for purposes of the Settlement, she satisfies the requirements of  
 13 typicality, and that she adequately represents the interests of the Settlement Class Members, and  
 14 appoint her as the representative of the Settlement Class;

15 c. Determine, preliminarily, that the Settlement Class meets all applicable  
 16 requirements of Fed. R. Civ. P. 23 (“Rule 23”), and conditionally certify the Settlement Class for  
 17 purposes of the Agreement under Rule 23 for settlement purposes only;

18 d. Appoint Plaintiff’s Counsel as Class Counsel pursuant to Rule 23(g);

19 e. Schedule the Final Approval Hearing to: (i) determine finally whether the  
 20 Settlement Class satisfies the applicable requirements of Rule 23 and should be finally certified  
 21 for settlement purposes only; (ii) review objections, if any, regarding the Agreement; (iii)  
 22 consider further the fairness, reasonableness and adequacy of the Settlement; (iv) consider Class  
 23 Counsel’s application for an award of attorneys’ fees and reimbursement of expenses; (v)  
 24 determine the validity of Requests for Exclusion and exclude from the Settlement Class those  
 25 Persons who validly and timely Opt-Out; (vi) consider Class Counsel’s application for payment  
 26 of an Incentive Award to the named Plaintiff; and (vii) consider whether the Court shall issue the  
 27 Final Judgment and Order Approving Settlement approving the Settlement and dismissing the  
 28 Action and all Constituent Actions with prejudice;

1 f. Set a briefing schedule for the Final Approval Hearing and Class Counsel's  
2 request for attorneys' fees and expenses, and the Incentive Award for the Class Representative;

3 g. Consider and determine that the Class Notice and the Notice Program: (i)  
4 meets the requirements of Rule 23(c)(3) and due process; (ii) is the best practicable notice under  
5 the circumstances; (iii) is reasonably calculated, under the circumstances, to apprise Settlement  
6 Class Members of the pendency of the Action and their right to object to the proposed Settlement  
7 or Opt-Out of the Settlement Class; and (iv) is reasonable and constitutes due, adequate and  
8 sufficient notice to all those entitled to receive notice;

9 h. Consider and approve the proposed Class Notice, Claim Form, and Notice  
10 Program;

11 i. Direct Philips or its designee(s) to cause the Class Notice to be  
12 disseminated in the manner set forth in the Notice Program on or before the Notice Date;

13 j. Consider and approve the designation of Dahl, Inc. as the Claims  
14 Administrator;

15 k. Require each Settlement Class Member who wishes to Opt Out of the  
16 Settlement Class to submit a timely written Request for Exclusion, on or before the Opt-Out and  
17 Objection Date, to the Claims Administrator, to Class Counsel, and to Philips' Counsel;

18 l. Rule that any Settlement Class Member who does not submit a timely  
19 written Request for Exclusion will be bound by all proceedings, orders and judgments in the  
20 Action;

21 m. Require any Settlement Class Member who wishes to object to the fairness,  
22 reasonableness or adequacy of the Agreement or to the award of attorneys' fees, costs and  
23 expenses and/or the Incentive Awards to submit to the Claims Administrator and deliver to Class  
24 Counsel and Philips' Counsel, postmarked on or before the Opt-Out and Objection Date, a  
25 statement of his or her objection, as well as the specific reason, if any, for each objection,  
26 including any legal support the Settlement Class Member wishes to bring to the Court's attention  
27 and any evidence the Settlement Class Member wishes to introduce in support of his or her  
28 objection, and to state whether the Settlement Class Member and/or his or her counsel wishes to

1 make an appearance at the Final Approval Hearing, or be forever barred from separately  
2 objecting;

3 n. Enter an order enjoining any new litigation related the subject matter of  
4 this action for the AirFloss by any Settlement Class Member;

5 o. Enter an order continuing all applicable pre-trial deadlines in the Action so  
6 that Philips and Plaintiff shall in no way be prejudiced by their efforts to resolve the claims  
7 resolved through this Agreement; and

8 p. Establish:

9 (i) the date and time of the Final Approval Hearing.

10 (ii) the Notice Date: The Parties propose that the Notice Date be eighty  
11 days before the Final Approval Hearing.

12 (iii) the Opt-Out and Objection Date: The Parties propose that the Opt-  
13 Out and Objection Date be twenty one days before the Final  
14 Approval Hearing.

15 (iv) the Claims Deadline: The Parties propose that the Claims Deadline  
16 be seventy-five days after the Final Approval Hearing.

## 17 **B. The Settlement Should be Preliminarily Approved**

### 18 **1. The Role of Preliminary Approval**

19 At the final approval stage, after the Class Members have been notified of the proposed  
20 settlement and had an opportunity to comment, the Court will be called upon to appraise whether  
21 the parties have negotiated a settlement that is fair, reasonable, and adequate to the class. At this  
22 preliminary approval stage, however, the Court determines only whether the proposed settlement  
23 “(1) appears to be the product of serious, informed, non-collusive negotiations; (2) has no obvious  
24 deficiencies; (3) does not improperly grant preferential treatment to class representatives or  
25 segments of the class; and (4) falls within the range of possible approval,” such that it is  
26 worthwhile to give the class notice of the settlement and proceed to a formal fairness hearing.  
27 *Harris v. Vector Marketing Corp.*, No. C-08-5198, 2011 WL 1627973, at \*7 (N.D. Cal. Apr. 29,  
28 2011); *see also* 4 Alba Conte & Herbert B. Newberg, Newberg on Class Actions § 11.25 (4th ed.

1 2002)

2 In other words, at the preliminary approval stage, the Court makes only a preliminary  
3 determination of the settlement's fairness, reasonableness, and adequacy, pointing out any  
4 settlement terms that are so unacceptable at the outset that a formal fairness hearing would be a  
5 waste of time. *See* Manual for Complex Litigation (Fourth) §§ 21.632 (2004); Conte & Newberg,  
6 Newberg on Class Actions § 11.25. The primary question for the Court at the preliminary-  
7 approval stage is whether the proposed Settlement falls within the range of possible approval,  
8 such that the class should be notified and a formal fairness hearing scheduled. *See Gautreaux v.*  
9 *Pierce*, 690 F.2d 616, 621, n.3 (7th Cir. 1982) (the purpose of preliminary approval "is to  
10 ascertain whether there is any reason to notify the class members of the proposed settlement and  
11 to proceed with a fairness hearing"); *see also Malta v. Federal Home Loan Mortg. Corp.*, No. 10-  
12 CV-1290 BEN (NLS), 2013 WL 444619, at \*5 (S.D. Cal. Feb. 5, 2013) ("At the preliminary  
13 approval stage, the Court need only review the parties' proposed settlement to determine whether  
14 it is within the permissible 'range of possible approval' and thus, whether the notice to the class  
15 and the scheduling of the formal fairness hearing is appropriate.") (citing *Alberto v. GMRI, Inc.*,  
16 252 F.R.D. 652, 666 (E.D. Cal. 2008)).

## 17 **2. The Proposed Settlement Merits Preliminary Approval**

18 The proposed settlement here is the product of arm's length negotiations by Plaintiff's  
19 counsel well versed in deceptive business practice class actions and thus entitled to an initial  
20 presumption of fairness. *See Harris*, 2011 WL 1627973, at \*8. The negotiations were aided by  
21 preliminary investigations, and interviews with others who have used the product. (Rott Decl. at  
22 par. 2.) In addition, Plaintiff's counsel consulted several dental professionals. (*Id.*, par 3.) Philips  
23 naturally disputed the strength of Plaintiff's case, and the settlement reflects the parties'  
24 compromise of their assessments of the worst-case and best-case scenarios, weighing the  
25 likelihood of various potential outcomes.

26 In Plaintiff's counsel's view, the settlement contains no obvious deficiencies: it provides  
27 class relief to address all of the products addressed in Plaintiff's complaint and does not provide  
28 for attorneys' fees at the expense of the class. Nor does the settlement grant preferential treatment

1 to the class representatives or any segment of the class, except to the extent that a proof of  
 2 purchase is required to obtain higher relief amounts, which is a reasonable condition for higher  
 3 benefits. But even Class Members who cannot prove that they purchased the product are entitled  
 4 to some relief under the terms of the class settlement. Each Class Member is entitled to the same  
 5 notice and disclosure, the same type of voucher and for the same amount, depending on the  
 6 product purchased. Vouchers are fully transferable, valid for twelve months after issuance, may  
 7 be used at certain well-known Philips retailers and may be used to purchase Philips audio, video,  
 8 shaving, oral care, and accessory products, as well as Avent-branded products.

9 Further analysis confirms that the settlement falls within the range of possible approval as  
 10 it accomplishes now—without the risk or prejudicial delay associated with further litigation, a  
 11 trial, or appeals—much of what Plaintiff sought in the lawsuit. *See Harris*, 2011 WL 1627973, at  
 12 \*8 (to evaluate the range of possible approval, courts primarily consider the value provided by the  
 13 settlement against the claims' expected recovery if tried).

14 Plaintiff believes that the strongest claims were based on Philips' alleged failure to  
 15 disclose that its product is not a replacement for floss. By settling now, Class Members who are  
 16 unaware that the AirFloss does not replace traditional floss, as alleged by Plaintiff, will be alerted  
 17 sooner rather than later. The remedy provided by the settlement is, in this sense, more valuable  
 18 than could be obtained through a trial, even without discounting for the possibility that Philips  
 19 could demonstrate that their statements were mere puffery and that their product is as good as  
 20 traditional floss. Under this settlement, rather than risk no recovery or a delayed recovery by  
 21 going to trial, Class Members who purchased the \$119.99 AirFloss will receive a \$33.00 voucher,  
 22 which represents 27% of the full value of the product.

23 Given the favorable terms of the settlement and the manner in which they were negotiated,  
 24 the proposed settlement should be viewed, at least preliminarily, as a fair, reasonable, and  
 25 adequate compromise of issues in dispute and within the range of reasonableness meriting  
 26 preliminary approval.

27 ///

28 ///

**C. The Proposed Settlement Class Should be Certified for Settlement Purposes and Plaintiff's Counsel Appointed As Class Counsel**

**1. The Proposed Settlement Class Meets the Requirements of Rule 23(a)**

Before granting preliminary approval of the settlement, the Court should determine that the proposed settlement class provisionally meets the requirements of Rule 23. *See Amchem Prods.*, 521 U.S. at 619-20; Manual for Complex Litigation §§ 21.632. The prerequisites for certifying a class are (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy of representation, each of which is satisfied here. *See Fed. R. Civ. P. 23(a)*.

Numerosity: The parties' proposed settlement class, set forth above in section II.C.1, encompasses owners of approximately 6,000 currently registered Sonicare AirFloss products in California plus an estimated 50,000 other consumers in California, (Rott Decl. par. 5-6), and so readily satisfies the numerosity requirement. *See Hanlon v. Chrysler Corp.* 150 F.3d 1011, 1019 (1998) ("The prerequisite of numerosity is discharged if 'the class is so large that joinder of all members is impracticable.'").

Typicality & Commonality: Plaintiff and each member of the settlement class purchased an AirFloss that Plaintiff has alleged was marketed as a replacement for traditional floss.

Plaintiff thus satisfies the typicality requirement for purposes of this settlement, as her consumer protection claims arise from the same alleged marketing to members of the class. *See Hanlon*, 150 F.3d at 1020 (typicality satisfied where plaintiffs' claims are "reasonably coextensive with those of class members"). For similar reasons, Plaintiff's claims also meet the commonality requirement for purposes of settlement in that they raise "questions of law or fact common to the class," including whether Philips marketed the AirFloss as the same as or a replacement for dental floss. *See Fed. R. Civ. P. 23(a)(2); see also Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011) (explaining that "[c]ommonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury,'" and claims arising from that injury depend on a "common contention . . . of such a nature that it is capable of class wide resolution.").

Adequacy of Representation: The final requirement of Rule 23(a), adequacy of representation, is also satisfied. Plaintiff and her counsel have shown, through their prosecution of

1 this action and negotiation of this proposed settlement, that they “will fairly and adequately  
2 protect the interests of the class.” Fed. R. Civ. P. 23(a)(4); *see also Amchem Prods.*, 521 U.S. at  
3 619-20 (the existence of a proposed settlement is relevant to class certification, including whether  
4 absent class members’ interests are being adequately represented).

## 5 **2. The Proposed Settlement Class Meets the Requirements of Rule 23(b)(3)**

6 “In addition to meeting the conditions imposed by Rule 23(a), the parties seeking class  
7 certification must also show that the action is maintainable under Fed. R. Civ. P. 3(b)(1), (2), or  
8 (3).” *Hanlon*, 150 F.3d at 1022. Here, the proposed class is maintainable under Rule 23(b)(3) as  
9 common questions predominate over any questions affecting only individual members and class  
10 resolution is superior to other available methods for a fair resolution of the controversy. *See id.* at  
11 1022-23 (citing Fed. R. Civ. P. 23(b)(3)); *Pierce v. County of Orange*, 526 F.3d 1190, 1198 (9th  
12 Cir. 2008). When assessing predominance and superiority, the court may consider that the class  
13 will be certified for settlement purposes only, and that a showing of manageability at trial is not  
14 required. *See Amchem Prods.*, 521 U.S. at 618.

15 “The requirement of Rule 23(b)(3) that common questions predominate over individual  
16 questions ‘tests whether proposed classes are sufficiently cohesive to warrant adjudication by  
17 representation.’” *Blades v. Monsanto Co.*, 400 F.3d 562, 566 (8th Cir. 2005) (quoting *Amchem*  
18 *Prods.*, 521 U.S. at 623). Class Members’ consumer protection claims here involve  
19 predominantly common legal and factual issues that can be fairly resolved for all through a class-  
20 wide settlement. As Plaintiff has contended throughout the litigation, the validity of these claims  
21 depends primarily on (i) whether the AirFloss is in fact a replacement for traditional floss, and (ii)  
22 whether a “reasonable consumer” would believe that the AirFloss is a replacement for traditional  
23 floss based on the packaging and advertisements. Each of these issues can be addressed (in this  
24 case through settlement) for all Class Members at once, justifying certification of these claims for  
25 settlement purposes.

26 At root, these claims depend on a legal analysis and interpretation of Philip’s advertising,  
27 which is a common issue across the class and which is particularly well suited to class wide  
28 resolution. With all Class Members’ claims hinging on common questions of advertising practices

1 it is both fair and logical to resolve those questions through a class-wide settlement. *See Wiener*  
 2 *v. Dannon Co., Inc.*, 255 F.R.D. 658, 664-65 (C.D. Cal. 2009) (“The proposed class members  
 3 clearly share common legal issues regarding [Defendant’s] alleged deception and  
 4 misrepresentations in its advertising and promotion of the Products.”).

5 Turning lastly to Rule 23(b)(3)’s superiority requirement, there is little doubt that  
 6 resolving all Class Members’ claims jointly—particularly through a class-wide settlement  
 7 negotiated on their behalf by counsel well-versed in consumer protection litigation—is superior to  
 8 a series of individual lawsuits. As the Ninth Circuit has stated: “From either a judicial or litigant  
 9 viewpoint, there is no advantage in individual members controlling the prosecution of separate  
 10 actions. There would be less litigation or settlement leverage, significantly reduced resources and  
 11 no greater prospect for recovery.” *Hanlon*, 150 F.3d at 1023. Indeed, the terms of the settlement  
 12 negotiated on behalf of the class, which provide relief for consumers who do not think that the  
 13 product was marketed correctly, demonstrate the advantages of a collective bargaining and  
 14 resolution process.

### 15 **3. Plaintiff’s Counsel Meet the Requirements of Rule 23(g).**

16 In connection with any order certifying a class, Rule 23(g) requires that the Court formally  
 17 appoint class counsel. Plaintiff’s counsel has a great depth of experience in consumer class action  
 18 litigation (Rott Decl. par. 10) and will zealously prosecute, as they have before, the claims of the  
 19 Class Members. Plaintiff’s counsel requests they be appointed to represent the certified settlement  
 20 class.

### 21 **D. The Court Should Preliminarily Approve the Proposed Settlement**

22 After certifying the settlement class, the Court should preliminarily approve the  
 23 settlement. The procedure for review of a proposed class action settlement is a well-established  
 24 two-step process. Fed. R. Civ. P. 23(e); *see also* Alba & Conte, 4 Newberg on Class Actions,  
 25 §11.25, at 38-39 (4th Ed. 2002). The first step is a preliminary, pre-notification hearing to  
 26 determine whether the proposed settlement is “within the range of possible approval.” Newberg,  
 27 §11.25, at 38-39 (quoting Manual for Complex Litigation §30.41 (3rd ed. 1995)); *In re Syncor*  
 28 *ERISA Litig.*, 516 F.3d 1095, 1110 (9th Cir. 2008). This hearing is not a fairness hearing; its

1 purpose, rather, is to ascertain whether there is any reason to notify the class members of the  
 2 proposed settlement and to proceed with a fairness hearing. *In re Syncor ERISA Litig.*, 516 F.3d at  
 3 1110. Notice of a settlement should be sent where “the proposed settlement appears to be the  
 4 product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not  
 5 improperly grant preferential treatment to class representatives or segments of the class, and falls  
 6 within the range of possible approval.” *In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078,  
 7 1079 (N.D. Cal. 2007). The Manual for Complex Litigation characterizes the preliminary  
 8 approval stage as an “initial evaluation” of the fairness of the proposed settlement made by the  
 9 court on the basis of written submissions and informal presentation from the settling parties.  
 10 Manual for Complex Litigation § 21.632 (4th ed. 2004). If the court finds a settlement proposal  
 11 “within the range of possible approval,” it then proceeds to the second step in the review  
 12 process—the final approval hearing. Newberg, §11.25, at 38-39. “To determine whether  
 13 preliminary approval is appropriate, the settlement need only be potentially fair, as the Court will  
 14 make a final determination of its adequacy at the hearing on Final Approval, after such time as  
 15 any party has had a chance to object and/or opt out.” *Acosta v. Trans Union, LLC*, 243 F.R.D.  
 16 377, 386 (C.D. Cal. 2007) (citing *Armstrong v. Bd. of Sch. Dirs. of the City of Milwaukee*, 616  
 17 F.2d 305, 314 (7th Cir.1980), *overruled on other grounds*, *Felzen v. Andreas*, 134 F.3d 873 (7th  
 18 Cir.1998)).

19 A strong judicial policy exists that favors the voluntary conciliation and settlement of  
 20 complex class action litigation. *In re Syncor*, 516 F.3d at 1101 (citing *Officers for Justice v. Civil*  
 21 *Serv. Comm’n*, 688 F.2d 615 (9th Cir. 1982). While the district court has discretion regarding the  
 22 approval of a proposed settlement, it should give “proper deference to the private consensual  
 23 decision of the parties.” *Hanlon*, 150 F.3d at 1027. In fact, when a settlement is negotiated at  
 24 arms’ length by experienced counsel, there is a presumption that it is fair and reasonable. *In re*  
 25 *Inter-Op Hip Prosthesis Liab. Litig.*, 204 F.R.D. 359, 380 (N.D. Ohio 2001). Ultimately, the  
 26 Court’s role is to ensure that the settlement is fundamentally fair, reasonable, and adequate. Fed.  
 27 R. Civ. P. 23(e)(2); *In re Syncor*, 516 F.3d at 1100.

28 ///

**E. The Court Should Order Dissemination of the Proposed Class Notice**

**1. The Settlement Agreement Provides for the Best Method of Notice Practicable Under the Circumstances**

The Federal Rules require that before finally approving a class settlement, “[t]he court must direct notice in a reasonable manner to all class members who would be bound by the proposal.” Fed. R. Civ. P. 23(e). Where the settlement class is certified pursuant to Rule 23(b)(3), the notice must be the “best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.” Fed. R. Civ. P. 23(c)(2)(B).

The parties have agreed on a notice plan that would provide Class Members with individual notice by a postcard or an email for all owners of an AirFloss who have registered with Philips. (*See* Rott Decl. Exhibit 1, Settlement Agreement F(a) and (b).)

In addition, Notice will be provided to unknown consumers by the following methods:

- a. a one-time publication of a 1/8 page advertisement in the Los Angeles Times and a one-time publication of a 1/8 page advertisement in the San Francisco Chronicle
- b. for the month following the publication, internet advertising targeting potential Class Members through keyword services provided by Google and Yahoo and other advertising on various social networking websites, including Facebook (which will include a posting of a link to the settlement Website on the AirFloss Facebook page);
- c. the issuance of an agreed-upon press release with a link to the Settlement Website through the PR Newswire service, which will distribute the press release to approximately 5,815 newspapers, television stations, radio stations and magazines as well as approximately 5,400 websites and online databases, including all major search engines;
- d. posting notice on the Philips website related to Sonicare and AirFloss products together with a link to the Settlement Website;

- 1 e. a toll-free telephone support system will be established that will provide Class  
 2 Members with (1) general information about the settlement; (2) frequently  
 3 asked questions; and (3) the ability to request a Notice and Claim Form;  
 4 f. Class Counsel will provide a direct link to the Settlement Website from their  
 5 firm's website.

6 "The court must direct notice in a reasonable manner to all class members who would be  
 7 bound by a proposed settlement, voluntary dismissal, or compromise." Fed. R. Civ. P. 23(e)(1).  
 8 Notice is "adequate if it may be understood by the average class member." *Newberg on Class*  
 9 *Actions*, §11.53, at 167 (4th Ed. 2002). Because the proposed settlement provides for a notice  
 10 campaign designed to reach virtually all members of the proposed class, Plaintiff requests that the  
 11 Court approve the method of notice.

12 **2. The Proposed Form of Notice Adequately Informs Class Members of the**  
 13 **Litigation and Their Rights in Connection with the Settlement**

14 The notice provided to Class Members should "clearly and concisely state in plain, easily  
 15 understood language" the nature of the action; the class definition; the class claims, issues, or  
 16 defenses; that the Class Member may appear through counsel; that the court will exclude from the  
 17 class any member who requests exclusion; the time and manner for requesting exclusion; and the  
 18 binding effect of a class judgment on Class Members. Fed. R. Civ. P. 23(c)(2)(B). The form of  
 19 notice proposed by the parties complies with those requirements. (*See* Ex. 1 - 4 attached to  
 20 Declaration of MIR.) It clearly and accurately informs Class Members of the material terms of the  
 21 settlement and their rights pertaining to it, including the right to opt out from or object to the  
 22 settlement. Plaintiff thus requests that the Court approve the form of notice as well.

23 **3. Notice of the Settlement will be Provided to Appropriate Federal and State**  
 24 **Officials**

25 Notice of the proposed settlement will also be provided to the Attorneys General of the  
 26 United States and the State of California, as required by the Class Action Fairness Act, 28 U.S.C.  
 27 § 1715(b). (*See* Rott Decl, Exhibit 1, Settlement Agreement C(3)) Philips will provide these  
 28 government officials with copies of all required materials—including the Settlement Agreement,

1 Class Notice, and the amended complaint—so that the state and federal government may make an  
 2 independent evaluation of the settlement and bring any concerns to the Court's attention prior to  
 3 final approval.

4 **F. The Court Should Set a Schedule for Final Approval**

5 The next steps in the settlement approval process are to notify the class of the proposed  
 6 settlement, allow Class Members an opportunity to file any objections or opt-outs, and hold a  
 7 final approval hearing. Toward those ends, the parties propose the following schedule:

- 8 a. The Notice Date: The Parties propose that the Notice Date be eighty days before the  
 9 Final Approval Hearing.  
 10 b. The Opt-Out and Objection Date: The Parties propose that the Opt-Out and Objection  
 11 Date be twenty one days before the Final Approval Hearing.  
 12 c. The Claims Deadline: The Parties propose that the Claims Deadline be seventy-five  
 13 days after the Final Approval Hearing.

14 **IV. CONCLUSION**

15 For the foregoing reasons, Plaintiff's counsel respectfully requests that the Court enter the  
 16 accompanying Proposed Order granting preliminary approval of the proposed settlement,  
 17 conditionally certifying the settlement class, appointing Plaintiff as Class Representative and her  
 18 attorneys as Class Counsel, directing dissemination of the class notice, and setting a hearing for  
 19 the purpose of deciding whether to grant final approval of the settlement.

20  
 21 Dated: May 28, 2013

**HIDEN, ROTT & OERTLE, LLP**

22  
 23 By: s/ERIC M. OVERHOLT

24 Michael Ian Rott, Esq.

25 Eric M. Overholt, Esq.

26 *Attorneys for Plaintiff, on behalf of herself*  
 27 *and all others similarly situated*  
 28